ALI HASSAN

v.

BUMIPUTRA-COMMERCE FINANCE BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[ORIGINATING SUMMONS NO: 24-01-2003]
28 MAY 2003

LAND LAW: *Charge - Rights of chargee - Chargee's remedy to foreclose lands barred by limitation - Whether chargee's rights and interest on lands extinguished*

The plaintiff chargor had charged his lands to the defendant chargee for a loan disbursed to the borrower by way of a third party charge. The borrower defaulted and the defendant commenced foreclosure proceedings in respect of the lands in 1987. Two auctions were held but were abortive. The defendant took no further action on its legal rights on the said lands. Before this court the plaintiff sought a declaration under s. 41 of the Specific Relief Act 1950, contending that the defendant's rights and interest on the lands had been extinguished and that the plaintiff was therefore entitled for the return of the lands free from encumbrances.

Held:

[1] On the facts, the defendant's remedy to foreclose the lands had been barred by limitation. However, a bar by limitation on the defendant to enforce its remedy is distinct and separate to the extinguishments of its rights and interest on the lands as a chargee. Limitation only barred the defendant from pursuing its remedy but did not extinguish its rights and interest on the lands *(Othman & Anor v. Mek* followed*)*. (p 304 a-c)

[2] There is an outstanding amount that has not been settled to date. Until the loan has been fully settled, the charge would remain forever as security to the loan, whether statute barred or not. Thus, the plaintiff was not entitled to the lands free from encumbrances. The passage of time did not have the effect of extinguishing the defendant's undoubted rights to the money disbursed to the borrower by way of the third party charge. (p 305 b, e-f)

[Declaration sought by plaintiff dismissed.]

Case(s) referred to:

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Hari Nath Chatterjee v. Mothurmohun Goswami [1894] ILR 21 Cal 8 ***(refd)***

Malayan United Finance Bhd v. Tan Lay Soon [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292 SC ***(foll)***

Othman & Anor v. Mek [1972] 2 MLJ 158 FC ***(foll)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 21(1)

National Land Code, s. 265(3)(b)

Specific Relief Act 1950, s. 41

For the plaintiff - R Sarengapani; M/s Vendargon & Partners

For the defendant - Faizal Hassan Abdul Hamid; M/s Edlin Ghazaly & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

Nik Hashim J:

The plaintiff is the registered owner chargor of six pieces of immovable property known as GM 595 to GM 600, Lot No. 1601 to 1606, all in the Mukim of Binjai (the lands) who had charged them to the defendant chargee *vide* Charge Presentation No. 1228/85, Jilid 15 Folio 93 on 7 December 1985 (the charge) for a loan sum of RM700,000 disbursed to one Ghulam Development and Construction (M) Sdn Bhd (the borrower) by way of a third party charge. The borrower defaulted and the defendant chargee issued a notice of default dated 28 August 1987 to the borrower and commenced foreclosure proceedings in respect of the lands. The land administrator granted order for sale and two auctions were held. As both auctions were abortive the defendant chargee proceeded with the action under s. 265(3)(b) of the National Land Code 1965 (the Code) in the Kuala Terengganu High Court.

The said action, however, was struck out by the High Court on 10 November 1994. No reinstatement was ever filed by the defendant chargee and neither did the plaintiff chargor applied to set aside the said order given on 10 November 1994. Finally, the defendant chargee took no further action on its legal rights on the said lands.

Realising the lapse of time since the date the cause of action accrued ie, from 29 August 1987, the plaintiff chargor gave notice to the defendant chargee to discharge the said charge at his own costs but the defendant failed and/or neglected to do so.

The plaintiff is now seeking a declaration under s. 41 of the Specific Relief Act 1950 contending that the defendant's rights and interest on the lands had been extinguished and the plaintiff is therefore entitled for the return of the said lands free from encumbrances.

It is to be noted that the defendant's remedy to foreclose the said lands secured by charge is 12 years from the date when the right to receive the money accrued due and owing ie, from 29 August 1987 till 28 August 1999. The applicable provision is s. 21(1) of the Limitation Act 1953.

The issue is whether the plaintiff is entitled for the return of the lands free from encumbrances as the defendant's action to foreclose the lands secured by way of charge had lapsed and is barred by limitation.

I have been informed by both counsel that there is no case law in the country on this point. However, learned counsel for the plaintiff submitted that the plaintiff is entitled for the declaration sought as the defendant had exhausted all its legal rights on the said lands. The defendant cannot hold on to the lands forever. The defendant, as the chargee, ought to exercise its right to foreclose the said lands in the event of default and not sit on the matter for 12 years. The defendant now cannot in law exercise its rights on the lands for reasons of limitation. The defendant slept on its rights when the proceedings were struck out on 10 November 1994. There should be a definite end to litigation and in support, learned counsel cited *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; ([1991] 1 CLJ (Rep) 69) SC where at p. 876 (p. 76) the Supreme Court said:

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
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> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

Learned counsel for the defendant admitted that the defendant's remedy to foreclose the lands has been barred by limitation. Nevertheless, he submitted that such a limitation does not extinguish the defendant's rights and interest on the lands.

With respect, I agree with the submissions of the defendant's counsel. A bar by limitation on the defendant to enforce its remedy is distinct and separate to the extinguishment of its rights and interest on the lands as a chargee. Limitation will only bar the defendant from pursuing its remedy but does not extinguish its rights and interest on the lands. His Lordship Ong CJ (Malaya) in *Othman & Anor v. Mek* [1972] 2 MLJ 158 FC at p. 160 said:

> **Statutes of Limitation which bar the enforcement of a right by action are rules of procedure only:** see *24 Halsbury*, 3rd Ed. Page 181. **A right which becomes unenforceable remedy by reason of limitation does not *ipso facto* perish or vanish into thin air:** see *Holmes v. Crowther* [1970] 1 WLR 835 where it was held that, although under section 18(5) of the Limitation Act, 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors nevertheless **were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not.**
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> At p. 165, His Lordship Ong Hock Sim FJ had this to say:
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> Statutes of limitation (as in this case) which **bar the remedy, but not the right, are rules of procedure only:** (see *24 Halsbury* 3rd Ed. Page 181). (emphasis added)

The above case clearly illustrates that the defendant despite being statute barred from proceeding with its remedy to commence an action to foreclose the lands still retains its right and interest on the lands. Such a right could not be denied simply due to reason any action already being time barred.

The principles governing the statutory charge under the Code are clearly stated in *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 2 CLJ 899; ([1991] 1 CLJ (Rep) 292) SC where His Lordship Jemuri Serjan SCJ at p. 904 (p. 298) said:

> Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s. 243).

Thus, upon registration of a charge, the charge remains intact as security to the loan and would remain so until the loan is fully settled. A discharge could only take place upon the full settlement of the loan to which the charge was created as security for. It is clearly seen from exh. MAH1 in the defendant's affidavit in reply (encl. 5) that as at 14 October 2002, there was an outstanding amount of RM749.420.09 and the same has not been settled to date.

Therefore, until the loan is fully settled, the charge would remain forever as security to the loan, whether statute-barred or not. The defendant's rights and interest on the lands are not extinguished.

From the facts of this case, I find that the plaintiff's action is misconceived. It is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one (per Gopal Sri Ram JCA in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 CA at pp. 824-825). But here, the plaintiff is relying upon limitation as a cause of action to achieve a collateral purpose in that he is seeking for the return of the lands free from encumbrances without first fully settling the loan under the charge. Certainly, this cannot be right. The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar of a certain period to a suit to enforce an existing right (per Sir Richard Couch in *Hari Nath Chatterjee v. Mothurmohun Goswami* [1894] ILR 21 Cal 8 at p. 18). Statutory limitation could not be the basis of an action; it could only be pleaded and relied upon as a defence to a suit. Surely, it would be a grave injustice to the defendant if the plaintiff were entitled to the lands free from encumbrances, whilst the loan still remains unsettled, merely because the defendant's remedy to foreclose the lands has been barred by limitation. That being the case, I hold that the passage of time did not have the effect of extinguishing the defendant's undoubted rights to the money disbursed to the borrower by way of the third party charge.

Accordingly therefore, in the exercise of my discretion, I hereby dismiss the declaration sought by the plaintiff with costs.